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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging systems at 929-930 MHz	)	PR Docket No. 93-35

To: The Commission

COMMENTS OF METAGRAM AMERICA INC.

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SUMMARY OF ARGUMENT

While Metagram endorses channel exclusivity, the Commission's proposed program is unfair to existing systems, and actually favors speculators who anticipated the Commission would adopt NABER's benchmarks for local, regional, and national exclusivity.

Accordingly, Metagram advances two proposals: a one-year "Achievement Period," and a 2-3 year conditional exclusivity period, to permit existing systems to achieve full exclusivity under the ultimately approved benchmarks. Metagram's system already meets 70-80% of the FCC's transmitter and market service benchmarks for national exclusivity.

Also, the coordination process must be more tightly managed and reviewed by the Commission. The Commission's proposed grandfathering system is inadequate, unfair to existing licensees not record supported, and rewards overbuilding and penalizes efficient operations. The Commission has not sufficiently articulated how local, regional, and national "exclusivity" conflicts between competitors are to be resolved.

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other applicants notified of pending frequency coordinations will not be permitted to delay the coordination and licensing process.

II. Metagram's Current Service

Metagram is the licensee of a wide-area PCP system on 929.9875 MHz (the "Frequency") serving 36 markets nationwide.[1] Metagram was one of the pioneers in establishing a nationwide system on the Private Carrier Paging (PCP) channels at a time when others were uninterested in doing so. In 1987, 1988, and 1989, Metagram embarked on an ambitious program to construct and operate a nationwide alpha-numeric paging system on 929.9875 MHz, (the "Frequency") one of the Commission's wide-area 900 MHz PCP channels. This effort resulted in a system of approximately 240 transmitters (excluding control frequencies) on 92 licenses. While small by comparison to common carrier systems operating on exclusive frequencies and permitted to serve the general public[2],

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1 Metagram and Metromedia Paging Systems, Inc (MPS), an applicant for new licenses on 929.9875 MHz, each have proposed to transfer their respective paging systems to new licensees. While the FCC has granted its consent to the transfer of control of MPS, MPS has not consummated the transaction and MPS's applications for authority to operate on 929.9875 MHz have not been granted to Metagram's knowledge. Metagram's applications to assign its licenses to MAP Paging Co., Inc., are pending.

2 In contrast, and only until recently, private carrier operators were prohibited from serving the public, and at most could serve businesses. This substantially restricted the market for PCP services. The Commission finally recognized this was a major impediment to the development of PCP systems, and has eliminated the restriction. "Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to provide Service to Individuals", <u>Notice of Proposed Rule Making</u>,

this at the time was the largest PCP system operating on a single frequency.

Metagram constructed its system and placed it in operation prior to the Petition for Rulemaking in which NABER suggested its threshold numbers, so Metagram's system can be reviewed by the submits, based on its many years of experience providing service to central Chicago that 10 transmitters are sufficient to qualify Metagram for "local" exclusivity in the market. "Regional" exclusivity in the Chicago MSA likely would require greater coverage.[3]

Similar considerations apply to Los Angeles, where Metagram's service from 16 transmitters in the hills surrounding the city provides good regional coverage to the MSA. In addition, Metagram provides virtually continuous coverage from Ventura County to the North of Los Angeles to the Mexican border south of San Diego utilizing 25 sites, including the 16 in the Los Angeles Market.[4]

Metagram would be entitled to local exclusivity in 16 of the 29 markets it serves outside the top three markets.[5] Of the thirteen markets in which Metagram currently does not have six transmitters, Metagram has five (5) transmitters in two (2)

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[3] The definition of what constitutes a "local" or "regional" market for purposes of exclusivity is one of the significant unanswered questions in this rulemaking. "Local markets should be defined as encompassing the incorporated areas of major cities. "Regional" markets should be defined to encompass Metropolitan Statistical Areas (MSA's) as defined by the Census Bureau.

[4] A similar wide-area system serves San Francisco/Oakland, San Jose, and Sacramento to the North.

[5] As previously discussed, Metagram believes the benchmark for exclusivity in the top three markets should not be eighteen transmitters.

markets,[6] and four transmitters in four other markets[7]. In four smaller markets, all of which are located in flat topography which, in geologic terms, are former shallow continental sea beds, Metagram provides good service with only three transmitters.[8] Metagram believes that in most of these markets the six transmitters are within twenty-five miles of each other, although

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6 Nashville, TN, and St. Louis Mo. Metagram believes that five transmitters are sufficient to cover these two markets.

7 Phoeniz, AZ, Memphis, TN, Portland, Ore., and San Antonio Tx. Phoenix and San Antonio are very flat, and the size of the markets permits four transmitters to provide good paging coverage. Portland's and Memphis' topography, while different, also is suitable to good service by four transmitters.

8 Columbus, OH; Indianapolis, IA; Orlando, Fla; Tucson, Arizona.

Metagram provides good service to three markets with two transmitters, namely, Denver, Colorado; Las Vegas, NV; New Orleans, LA. In Denver, one transmitter is located downtown, and one transmitter is located on "Lookout Mountain", which speaks for itself. Las Vegas, located on the desert floor surrounded by mountains, is a sufficiently concentrated community to be served well by two transmitters. Similarly, New Orleans is a concentrated urban area located in the flatlands of the Mississippi delta, and two transmitters does a more than adequate job. Metagram's opportunity to expand in these markets should not be cut off by those who "overbuild" the market with small-power transmitters simply to take advantage of an artificial "six-transmitter" benchmark. No such transmitter benchmark was used in cellular, for example, and the "quality of signal" requirements for paging are much different than the "voice quality"

Metagram has not performed engineering measurements to determine the exact distances between its transmitter locations.[9]

Regional Exclusivity. Metagram has 240 transmitters in 28 states and the District of Columbia. Metagram has three regions in which it has over seventy transmitters in contiguous states. Metagram has 72 transmitters in the seven contiguous western states comprised of:

Washington	9
Oregon	4
California	44
Nevada	2
Arizona	7
Colorado	2
Kansas	4
Total	72

Metagram has 77 transmitters in the Northeast in eight contiguous states and the District of Columbia:

Northeast Contiguous States

New York/Conn/New Jersey	31
Pennsylvania	27
Del./Md/Va./DC	10
Ohio	9
Total	77

Metagram has 84 transmitters in the Central/Southern States region comprising the states generally contiguous to the Mississippi Valley north/south routes, and including Texas and Florida, also

[9] Section 90.741 states that transmitters are considered to be serving a market if they are within 60 km (37.3 miles) of the specified market coordinates. Metagram believes this is a useful standard, and for purposes of consistency in the rules, should be employed in determining whether transmitters are contiguous.

used heavily by the central corridor states in their north/south vacationing.

Central/Southern Contiguous States

Michigan	8
Indiana	3
Illinois	10
Missouri	8
Tennessee	7
Georgia	8
Florida	18
Arkansas	1
Mississippi	1
Louisiana	[illegible]

unnecessary to establish local exclusivity in all of the top 30 markets and would result in artificial overbuilding. To engraft this inefficient and uneconomical requirement onto the regional exclusivity concept as well makes no sense and is not in the public interest.[10]

National. Metagram has built a system which includes 80% of the transmitters necessary to enjoy national exclusivity under the Commission's proposed rules (i.e., 240 of the 300-transmitter threshold number). Metagram provides service in thirty-six (36) of the markets listed in Section 90.741 of the Commission's rules.[11] In fact, Metagram serves twenty-six (26) of the top 30 markets[12]. See Section 90.741, for the existing market definition.[13]

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[10] Of the four states that would be excluded under the "six-transmitter" test, two states (Oregon and Colorado) permit service from high mountain sties which provide excellent wide area coverage, and two (Indiana and Louisiana) involve service by transmitters to extremely flat areas where propagation problems are minimal.

[11] The Commission indicates that a national licensee must serve at least 50 markets, but does not define the term "market. Some of the markets listed in Section 90.741 are hyphenated markets that are large, regional metro areas, such as New York and Los Angeles. Indeed §90.741 is out of date. The Washington/Baltimore market is now listed by the Census Bureau as one MSA, even though it is listed as two in this section of the Commission's rules.

[12] Metagram serves all of the markets in the top thirty markets listed in Section 90.174 except Boston, MA, Cleveland, OH, Milwaukee, WI, and Buffalo, NY

[13] Depending upon how the Commission defines "market" for purposes of the "regional coverage" test for national exclusivity, Metagram believes it serves at least two "markets" in every one of the seven (7) RBOC regions. For example, in Region 1, (see p. 11 of the NPRM) Metagram has 31 transmitters in the New York/northern New

Although Metagram serves 36 of the markets listed in Section 90.741, including 26 of the top 30 markets, Metagram is 72% constructed toward meeting Commission's proposed requirement that an applicant serve 50 markets, if Section 90.741 is the market definition. Metagram submits that the proposed 50 market figure is unrealistic and should not be adopted because of the growth of large regional metropolitan areas that encompass many smaller communities.

For example, Metagram's Los Angeles/San Diego system extends from Ventura County north of Los Angeles to the Mexican border south of San Diego. According to Section 90.741 this is three markets (Los Angeles, San Diego and Ventura) but it encompasses numerous towns and cities. As urban sprawl continues, more hyphenated markets are being created, such as the newly announced Washington/Baltimore MSA, which encompasses numerous towns and cities in this area, as the Commission is aware.

The Commission's proposed rules should provide that an existing licensee, such as Metagram, which has built a substantial system within 60% of one or more of the benchmark criteria for determining national exclusivity, will qualify for Conditional National Exclusivity based upon service to at least 25 of the

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Jersey area, and Stamford, Conn. Metagram believes an "RBOC Region" sub-test is counter-productive and unnecessary. Metagram can serve 25 of the top 30 markets, but a competitor could challenge Metagram's right to national exclusivity by arguing that Metagram covered only one "market" in Region 1, by placing Stamford, Conn. in the New York "market." With a "top-fifty" market test for national exclusivity, a "regional" test is unnecessary and counterproductive.

markets listed in Section 90.741, including at least 20 of the top 30 markets. A licensee enjoying Conditional National Exclusivity would have a minimum of one year, and more realistically, two to three years from the release date of the order to provide service exclusive channels and the way in which any new rules to determine exclusivity should be implemented.

On April 24, 1992, the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) advised the Commission that the 900 MHz paging channels were becoming saturated, as had the 150 MHz and 450 MHz licensee would achieve nationwide exclusivity on a channel if it constructed 300 transmitters.[18]

This Petition led to immediate speculation by applicants attempting to take advantage of a proposal that seemed likely to be ruled on favorably by the Commission.[19] The reply comment period on NABER's Petition for Rule Making closed in late June, 1992.

Two months after the record closed, and with full knowledge of the NABER Petition, Metromedia Paging Services, Inc. (MPS) filed with NABER, the frequency coordinator, applications to construct approximately 347 transmitters on 929.9875 MHz, the frequency occupied by Metagram ("the Frequency"). 929.9875 MHz is one of the multi-area frequencies reserved for large regional and national systems by the FCC's current rules.[20]

This filing, which came to Metagram's attention in October, 1992 when NABER notified Metagram that it had coordinated MPS on the Frequency, has indeed led to litigation before the Commission. See NABER Petition at 4. Metagram has demonstrated that MPS's occupancy of the channel with Metagram would disrupt Metagram's service to its customers, and that MPS's planned system and services would saturate the channel. Metagram also demonstrated that the combination of Metagram's alpha numeric paging system with MPS's proposed high-volume data transfer system would create

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[18] Id., at 11.

[19] The subsequent adoption of this NPRM, and many of NABER's proposals, including the 300-transmitter benchmark, proved many of these speculators correct.

[20] See Section 90.494(d) of the Rules.

substantial inconsistencies one with another on the channel, and that Metagram's system and customers would be the ones most injured. Metagram also demonstrated that MPS's proposed system of "sharing" the channel through MPS's selected method of "arbitration", rather than time sharing, would restrict Metagram's access to the channel in favor of MPS's high-volume data clusters.[21]

Metagram also demonstrated that MPS's request for a 5-year waiver of the rules to construct its system was unsupported and constituted a further attempt by MPS to warehouse the frequency. The Mobile Services Division of the Private Radio Bureau apparently agreed, because it denied MPS's waiver request on January 15, 1993.[22]

Subsequently, in 1993, Metromedia filed for additional transmitters on 929.1375 MHz in Chicago, in some instances on the same site as MPS's earlier applications for 929.9875 MHz. These applications, and MPS's dual applications for the Frequency in Los Angeles, Las Vegas, and other markets in which it holds licenses for 929.1375 systems, would violate the Commission's proposed new Section 90.495 (d) that a licensee can only hold one channel in an area:

> No applicant of affiliate of an applicant may apply for an additional frequency in an area that is the subject of the applicant's prior

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21 Metagram "Consolidated Response to Metromedia Replies to FCC Letters" , File Nos. 613586-660.

22 MPS did not seek reconsideration or review of the denial of its waiver request.

> application unless the system proposed in the prior application has been constructed, is operating , and meets the [exclusivity] criteria.

This rule should be strengthened to limit an applicant to one PCP channel in a market, without exception, if an applicant has exclusivity.

These are exactly the types of problems which channel exclusivity will avoid. Unfortunately, the lapse of time between NABER's April, 1992 Petition and the Commission's February 18, 1993 adoption of the NPRM left a substantial period of time for channel speculation and positioning by those who had expressed no interest in the PCP channels prior to April, 1992.

IV. The Proposed Rules Give an Unfair Advantage to New Applicants

The proposed rules give an unfair advantage to new applicants. For example, under the proposed rules MPS, a common carrier applicant whose warehousing of other PCP channels has been called into question,[23] could theoretically achieve exclusivity on the Frequency and Metagram would be unable to expand locally, regionally, or nationally to compete.

Under the current proposal, if MPS's applications were granted, MPS would have eight months to construct. If at the end

[23] Metagram demonstrated that MPS was not operating on 929.1375 in Los Angeles when Metagram monitored the frequency on December 31, 1992. MPS has never disputed or responded to Metagram's monitoring. See Metagram's "Reply to Opposition", filed December 30, 1993, File Nos. 613586-660.

of those eight months MPS had constructed 300 or more transmitters in at least fifty (50) markets, and in twenty-five (25) of the top 50 markets[24], MPS would achieve exclusivity nationwide, and Metagram would be "grandfathered" but unable to expand its system to compete with MPS. If MPS were permitted by the Commission to establish exclusivity, and Metagram were not, presumably MPS would argue that, as the holder of exclusivity, it should receive preference (or dominate) the manner in which the channel was shared with the "grandfathered", but non-dominant licensee. This would further put Metagram at a competitive disadvantage, because as a practical matter MPS could dictate the manner in which the channel was shared.[25] The end result would be that one of the nation's ten largest common carriers would be permitted at a late date to dominate a nationwide PCP frequency at the expense of more

This result could arise because, by relying on the date of contrary to any known marketplace realities and economimetric models.

Existing licensees must file their applications for new facilities with the frequency coordinator within 60 days of the release date. This would allow approximately four months for applicants to prepare and coordinate any additional applications, and eight months to build the applications. During this one year period, only existing licensees or permittees with unconstructed licenses would be allowed to file new applications.[28] If the applications are submitted for coordination within two months of the release of the text of the Report and Order adopting exclusivity, any delay in coordination or delay caused by oppositions or petitions for reconsideration by competitors would be added to the exclusivity date, so that competitors could not thwart the one-year construction period. This one-year "achievement period" would apply on a per-channel basis, not on a per-applicant or per-license basis, as the Commission presently proposes.

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[28] While this still rewards speculators who filed between April, 1992 and the 1993 adoption of the report and order in this proceeding, it would not further clog the PCP frequencies until the Commission could determine whether existing licensees were capable of achieving exclusivity on the channel. Granted, there will be sharing even on exclusive channels between grandfathered licensees and other licensees. However, the Commission should not exacerbate the situation by permitting new applicants to further share the channel during the period it is giving other applicants an opportunity to achieve competitive equality on shared channels.

These procedures promote fairness, and do not reward speculation. The procedures permit existing licensees an opportunity to engage in constructive and coherent planning to take advantage of the new rules. The Commission can offer no substantial basis in the record for awarding exclusivity immediately upon adoption of this NPRM to one class of licensees without giving existing licensees who, like Metagram, may be 80% of the way toward national exclusivity, a reasonable period of time to achieve parity with speculators. Adoption of rules which award exclusivity on the "staggered starting gate" formula would be arbitrary and capricious.

Both the Metromedia filings and the Commission's temporary adoption of a freeze demonstrate that speculation in anticipation of the adoption of the NABER exclusivity proposal already had taken place. The Commission lifted the freeze only because the disruption to the industry's development and expansion plans generally outweighed the Commission's desire to curb speculators.[29] However, the Commission still has an interest in deterring speculation and in equalizing competition. The Commission should adopt appropriate safeguards, placing applicants on an equal footing.

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[29] "This potential negative impact of the freeze is sufficiently widespread that we are concerned it may outweigh the public interest benefits that caused us to implement it." Order in PR Docket No. 93-35, (FCC 93-171) (released April 6, 1993)

V. The Coordination Process Should be More Closely Regulated During the "Achievement Period" and Thereafter

The coordination process is subject to abuses as presently organized. Metagram has found that its applications for modification or renewal of facilities have run into more complications and have generally taken longer to process since MPS was coordinated on the channel. Metagram does not mean to criticize NABER for these problems, since NABER appears to be carrying out its stated procedures of notifying MPS of Metagram's applications, and permitting comments thereon, even though MPS at applications, MPS has sought to have the assignment/modification applications sent back to NABER for coordination. Thus, MPS specifically is attempting to use the coordination process to delay the processing of a competitor's applications.

If an "Achievement Period" is not combined with adequate regulation of the coordination process, a competitor with coordinated applications can use the coordination process to delay the processing of a competitor's applications while the first applicant is attempting to build exclusivity. The "Achievement Period" permits a stated time for all existing licensees to "develop or expand their system based on plans formulated prior to grandfathered system to expand within existing grandfathered areas,[32] but as a practical matter Metagram believes that this proposal would be insufficient in the highly competitive paging environment to preserve the economic health of a grandfathered system. It also would likely be difficult to administer, and could cause substantial litigation over whether a grandfathered system was expanding within its "existing" grandfathered market.

Any successful economic model is based on new investment and growth. The concept that, as soon as these rules are adopted, without a reasonable Achievement Period, a "grandfathered" licensee would not be able to expand on a channel outside its grandfathered area is anathema to such basic economic principles. A "grandfathered" licensee which cannot expand its system locally, regionally, or nationally is consigned to the economic scrap heap; its system is less attractive to investors. Competition in many mobile communications markets is based on the increasing size, quality and scope of coverage, characteristics which depend directly or indirectly on the number of tower sites. A competitor who can expand can sell its system as capable of meeting the needs of customers now and in the future without disruption. The "grandfathered" system is doomed to be smaller than the "exclusive" system at some point, and that fact can be used to devastating economic advantage in the highly competitive paging environment. As a result, such "grandfathered" rules, if not more carefully crafted, virtually force a "grandfathered system" at some stage

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[32] NPRM at 7.

either to a) enter into a "distress sale" with the competitor enjoying exclusivity and the right to expand, or b) go bankrupt.

This proceeding is not only about "exclusivity", but is also